

1 SO. CAL. EQUAL ACCESS GROUP
Jason J. Kim (SBN 190246)
2 Jason Yoon (SBN 306137)
101 S. Western Ave., Second Floor
Los Angeles, CA 90004
3 Telephone: (213) 252-8008
Facsimile: (213) 252-8009
4 scalequalaccess@yahoo.com

5 Attorneys for Plaintiff
6 JARDINE GOUGIS

7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**

9 JARDINE GOUGIS,
10 Plaintiff,

11 vs.

12 2523 CANADA, LLC; and DOES 1 to 10,
13 Defendants.
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Case No.: 2:23-cv-03595-FLA (JPRx)

PLAINTIFF’S RESPONSE TO ORDER
TO SHOW CAUSE RE:
SUPPLEMENTAL JURISDICTION

18
19 **I. THIS COURT SHOULD EXERCISE SUPPLEMENTAL**
20 **JURISDICTION SINCE IT HAS ORIGINAL JURISDICTION OVER**
21 **PLAINTIFF’S AMERICANS WITH DISABILITIES ACT CLAIM**
22 **AND BECAUSE THE UNRUH CLAIM IS SO RELATED, THE**
23 **CLAIM FORMS PART OF THE SAME CASE OR CONTROVERSY.**

24 Under 28 U.S.C. § 1367 (“section 1367”), where a district court has original
25 jurisdiction over a claim, it also has supplemental jurisdiction over “all other claims that
26 are so related to claims in the action within such original jurisdiction that they form part
27 of the same case or controversy.” A state claim is part of the same “case or controversy”
28 as a federal claim when the two “derive from a common nucleus of operative fact and are

1 such that a plaintiff would ordinarily be expected to try them in one judicial proceeding.”
2 (Kuba v. 1-A Agr. Ass'n, 387 F.3d 850, 855-56 (9th Cir. 2004)).

3 A. This Court Has Original Jurisdiction.

4 “The district courts shall have original jurisdiction of all civil actions arising under
5 the... laws... of the United States.” Here, Plaintiff has filed suit under the Americans
6 with Disabilities Act, a federal statute. Accordingly, the Court has original jurisdiction, as
7 the case is a civil action arising under United States law.

8 B. The State Claim Is so Related It Forms Part of the Same Case or
9 Controversy.

10 Citing Cal. Civ. Code section 51 subsection (f), “The Unruh Act provides that a
11 violation of the ADA is a violation of the Unruh Act,” Plaintiff claims a violation of the
12 Unruh Act based solely on the ADA violations alleged in the Complaint. [ECF No. 1].

13 Thus, the ADA and Unruh Acts are inextricably intertwined. A violation of the
14 ADA is a per se violation of Unruh. The incident that forms the basis of both claims is
15 identical. The Parties are identical. The witnesses are identical. All the documentary
16 evidence (photographs, measurements, bank records, policies, etc.) are identical. All the
17 case law, regulatory material, regulations, and accessibility standards necessary to
18 demonstrate liability under both claims are identical. Plaintiff’s counsel is not aware of a
19 federal and state claim more intertwined than the ADA/Unruh pair.

20 Given the per se nature of the Unruh claim and that Plaintiff has only pled Unruh
21 as being violated per se by the ADA violation, the claims form part of the same case or
22 controversy.

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II. THE UNRUH CLAIM DOESN'T RAISE A NOVEL OR COMPLEX ISSUE OF STATE LAW, DOES NOT PREDOMINATE OVER THE ADA CLAIM, AND THERE ARE NO EXCEPTIONAL CIRCUMSTANCES OR COMPELLING REASONS FOR NOT GRANTING JURISDICTION.

The exercise of supplemental jurisdiction is mandatory, unless prohibited by section 1367(b) or one of the exceptions set forth in section 1367(c) applies. Under section 1367(c), a court may decline to exercise supplemental jurisdiction where: “(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.”

A. The State Claim Doesn't Raise a Novel and/or Complex Issue of State Law.

Though some courts previously found inclusion of an Unruh Act violation in an ADA suit to present novel or complex legal issues best left to state courts, most of these cases centered on whether Unruh requires proof of intentional discrimination, a now resolved question. (See, for example, *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142 (1991) and *Gunther v. Lin*, 144 Cal.App.4th 223 (2006), both overruled by *Munson v. Del Taco, Inc.*, 46 Cal.4th 661 (2009)). There have been a slew of other arguments raised on this topic but all of them have been resolved or rejected by courts. To borrow the phrasing of one court, most examples “are either irrelevant or erroneous.” (*Moore v. Dollar Tree Stores Inc.*, 85 F. Supp. 3d 1176, 1193 (E.D. Cal. 2015) (rejecting the argument that an Unruh claim over a barrier raises a novel or complex issue of state court)). The bottom line is that “courts routinely exercise jurisdiction over supplemental claims under [Unruh], as these types of claims do not generally raise novel or complex

1 issues of state law.” (Kohler v. Islands Restaurants, LP, 956 F. Supp. 2d 1170, 1175 (S.D.
2 Cal. 2013) (collecting cases, including a Ninth Circuit case)).

3 B. The State Claim Doesn’t Substantially Predominate Over the ADA
4 Cause of Action.

5 As stated above, the incident that forms the basis of both claims is identical. The
6 parties are identical. The witnesses are identical. All the documentary evidence
7 (photographs, measurements, bank records, policies, etc.) are identical. All the case law,
8 regulatory material, regulations, and accessibility standards necessary to demonstrate
9 liability under both claims are identical. Proving up the ADA claim is the same work and
10 same effort as proving up the Unruh claim. As one court summarized:

11 The state-law claims do not substantially predominate in terms of proof.
12 Indeed, because the claims are mostly based on ADA violations, the proof
13 for those claims is identical to that needed to prove violation of the ADA.
14 For the state-law claims, Plaintiff need only make an additional showing of
15 the particular “occasions” on which he encountered the barriers or was
16 deterred from visiting the restaurant because of the barriers in order to make
17 out his claims for statutory damages. To be sure, the availability of damages
18 under state law means that the state-law claims present a slightly larger
19 scope of issues and offer more comprehensive remedies. Nonetheless, the
20 Court does not find that this causes the state-law claims to substantially
21 predominate this litigation.

22 (Kohler v. Rednap, Inc., 794 F. Supp. 2d 1091, 1096 (C.D. Cal. 2011)).

23 Moreover, the mere fact that the Unruh claim has an additional remedy does not
24 mean that it “substantially predominates” over the case. “Other than the availability of
25 statutory damages under state law, the state and federal claims are identical. The burdens
26 of proof and standards of liability are the same. Indeed, the Unruh Act specifically
27 provides that a violation under the ADA also constitutes a violation of the Unruh Act.”
28 (Moore, 85 F.Supp.3d at 1194 (finding that an Unruh claim for statutory damages does
not substantially predominate over the federal ADA claim); see also Schoors v. Seaport
Village Operating Co., LLC, 2017 WL 1807954, (S.D. Cal. May 5, 2017)).

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1 It is hard to reach a different conclusion on this topic. “Plaintiff’s state and federal
 2 law claim involve the identical nucleus of operative facts, and require a very similar, if
 3 not identical, showing in order to succeed.” (Delgado v. Orchard Supply Hardware Corp.,
 4 826 F. Supp. 2d 1208, 1221 (E.D. Cal. 2011) (finding no substantial predominance). This
 5 court should not decline supplemental jurisdiction on the basis that the Unruh claim for a
 6 statutory penalty substantially predominates. It simply does not. Encountering an ADA
 7 barrier is not only the standard for an ADA violation but is also the standard for recovery
 8 of statutory damages. “The litigant need not prove she suffered actual damages to recover
 9 the independent statutory damages of \$4,000.” (Molski v. M.J. Cable, Inc., 481 F.3d 724,
 10 731 (9th Cir. 2007)). In the present matter, Plaintiff is seeking no more than a single
 11 statutory minimum penalty assessment of \$4,000.00.

12 C. Supreme Court Has Repeatedly Stated that the Most Important
 13 Considerations are Factors of Economy, Convenience, Fairness, and Comity.
 14 These Factors Point Towards Supplemental Jurisdiction Being Exercised.

15 More importantly, even substantial predominance is found, the Court is required to
 16 take the next step and consider the impact of declining or exercising supplemental
 17 jurisdiction: the “justification” underlying the decision whether to maintain supplemental
 18 jurisdiction or dismiss claims, “lies in considerations of judicial economy, convenience
 19 and fairness to litigants...” (United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726
 20 (1966)). In fact, the Courts have recognized that judicial economy is the “essential policy
 21 behind the modern doctrine of pendent jurisdiction...” (Graf v. Elgin, J. & E. Ry., 790
 22 F.2d 1341, 1347–48 (7th Cir.1986)). As the Supreme Court noted: the “commonsense
 23 policy of pendent jurisdiction” is “the conservation of judicial energy and the avoidance
 24 of multiplicity of litigation.” (Rosado v. Wyman, 397 U.S. 397, 405 (1970)).

25 Here, if this Court were to decline to exercise supplemental jurisdiction over the
 26 state claim, it would result in the plaintiff pursuing the Unruh claim in state court while,
 27 simultaneously, prosecuting the ADA claim in federal court. Given that the plaintiff’s
 28 state claim is predicated upon a finding that the ADA has been violated, this means that

1 almost identical cases would be prosecuted in two different forums. The Delgado court
2 reasoned:

3 Here, the claims arise from a common nucleus of operative facts. Both the
4 federal and state law claims are based upon architectural barriers which
5 infringe upon the accessibility to the OSH Store. Accordingly, this Court has
6 supplemental jurisdiction over the state law claims. The Court will exercise
7 supplemental jurisdiction over the state law claims. Here, the state issues are
8 not unsettled or novel and complex. Plaintiff's state and federal law claim
9 involve the identical nucleus of operative facts, and require a very similar, if
10 not identical, showing in order to succeed. If this court forced plaintiff to
11 pursue his state law claims in state court, the result would be two highly
12 duplicative trials, constituting an unnecessary expenditure of plaintiff's,
13 defendant's, and the two courts' resources. As a practical matter, plaintiff's
14 state law claims for damages may be the driving force behind this action. To
15 rule as OSH proposes, however, would effectively preclude a district court
16 from ever asserting supplemental jurisdiction over a state law claim under
17 the Unruh Act.

18 Delgado, 826 F. Supp. at 1221.

19 The Kohler case presents a lengthy analysis of the issue and concluded that
20 fairness favored keeping the Unruh claim in federal court “rather than in a separate, and
21 largely redundant, state-court suit.” (Kohler, 794 F. Supp. 2d at 1096). Another framing
22 of the analysis states that supplemental jurisdiction should be exercised to avoid “two
23 parallel proceedings, one in federal court and one in the state system.” (Borough of W.
24 Mifflin v. Lancaster, 45 F.3d 780, 787 (3d Cir. 1995). Here, the principles of judicial
25 economy and fairness militates toward keeping Unruh.

26 In a recent opinion, the appellate court “agreed with the district court that the
27 extraordinary situation created by the unique confluence of California rules involved
28 here, which has led to systemic changes in where such cases are filed, presents
“exceptional circumstances” that authorize consideration, on a case-by-case basis, of
whether the ““principles of economy, convenience, fairness, and comity which underlie
the pendent jurisdiction doctrine”” warrant declining supplemental jurisdiction.” Arroyo
v. Rosas, No. 19-55974, 2021 U.S. App. LEXIS 36510 (9th Cir. Dec. 10, 2021) at 5.

1 Here, we are presented with a converse comity concern - namely, that
2 retention of supplemental jurisdiction over ADA-based Unruh Act claims
3 threatens to substantially thwart California's carefully crafted reforms in this
4 area and to deprive the state courts of their critical role in effectuating the
5 policies underlying those reforms. As noted earlier, the California
6 Legislature recognized that its creation of a damages remedy for
7 "construction-related accessibility claims" had imposed significant burdens
8 on small businesses and created potential incentives for plaintiffs and their
9 counsel to seek monetary settlements at the expense of forward-looking
10 relief that might benefit the general public.

11 Id. at 21.

12 In fact, in *Gibbs*, the Court noted that *even in circumstances where the federal*
13 *claim has been lost*, the Court may want to maintain supplemental jurisdiction where the
14 state claim is so closely intertwined with the federal claims: "There may, on the other
15 hand, be situations in which the state claim is so closely tied to questions of federal
16 policy that the argument for exercise of pendent jurisdiction is particularly strong."
17 (*Gibbs*, 383 U.S. at 727.).

18 Further, filing in state court would cause a "high frequent litigant," as discussed
19 later, such as Plaintiff to incur an unreasonable amount of financial burden in the amount
20 of \$1,000. Such financial burden would prohibit Plaintiff from enforcing Plaintiff's right
21 to bring a substantial claim against individuals and entities who have injured Plaintiff in
22 Plaintiff's right provided by ADA and applicable state statutes. Also, defendants take
23 ADA cases filed in federal courts a lot more seriously in terms of resolving any and all
24 issues, especially for remediating the violations that have injured Plaintiff because of the
25 existence of statutory minimum of \$4,000 per violation as well as award of attorneys'
26 fees if successful on the merits. Without such financial incentive, defendants would not
27 focus on swiftly remediating any and all ADA barriers at issue and would rather drag the
28 litigation to trial, wasting time and resources for all parties and the Court.

1 Although some courts have declined supplemental jurisdiction under a “substantial
 2 predominance” standard, those decisions are scattered and cannot withstand serious
 3 scrutiny. But, more importantly, those other decisions never address the factors that the
 4 Supreme Court have said are essential, namely economy, convenience, fairness, and
 5 comity. As the *Moore* court stated, those decisions, “failed to address how declining
 6 jurisdiction served these the values of economy, convenience, fairness, and comity.”
 7 (Moore, 85 F.Supp.3d at 1194.). It is hard to argue with the Moore court’s conclusion
 8 that: “the Court's exercise of supplemental jurisdiction would best advance economy,
 9 convenience, fairness, and comity. The state and federal claims are so intertwined that it
 10 makes little sense to decline supplemental jurisdiction. To do so would create the danger
 11 of multiple suits, courts rushing to judgment, increased litigation costs, and wasted
 12 judicial resources.” (*Id.*).

13 This is not just a calendar clearing exercise that the court is considering. Were the
 14 Court to deny federal jurisdiction to Plaintiff’s state claims, Plaintiff would have to
 15 litigate these claims in parallel in state court, or abandon the right to file well-pleaded and
 16 meritorious claims in federal court entirely. Plaintiff’s state claim is predicated on
 17 adjudication of the federal claim, over which this Court has original jurisdiction. This
 18 puts Plaintiff’s claims in a complicated position, as the state court claim cannot
 19 reasonably be resolved without final resolution of the federal case, or risk inconsistent
 20 decisions on identical facts.

21 D. There Are No Exceptional Circumstances for Declining Jurisdiction.

22 Five central district judges have issued more than 110 OSCs on this topic. While
 23 most have not identified any specific rationale in their orders identifying exceptional
 24 circumstances or compelling reasons for declining jurisdiction, some courts have been
 25 more expansive in their OSCs and cited heavily to California state law procedures and
 26 noted that plaintiffs seem to be forum shopping to avoid state court requirements. But a
 27 litigant choosing from two proper jurisdictions is not inappropriate forum shopping, is
 28

1 not “exceptional,” and does not provide a compelling reason to decline to exercise
2 supplemental jurisdiction. As one court explained:

3 [T]he fact that Plaintiff is “forum shopping” by filing suit in this Court rather
4 than state court does not constitute a “compelling reason” for declining
5 jurisdiction. There is no reason why Plaintiff should have to file his claims
6 in state court instead. “This sort of forum-shopping is commonplace among
7 plaintiffs and removing defendants alike and is not an ‘exceptional’
8 circumstance giving rise to compelling reasons for declining jurisdiction, as
9 required by section 1367(c)(4).” Chavez, 2005 WL 3477848, at *2. The fact
10 that Plaintiff and his counsel frequently file suits asserting disability rights
11 violations does not change this conclusion. The Ninth Circuit has
12 acknowledged that “[f]or the ADA to yield its promise of equal access for
13 the disabled, it may indeed be necessary and desirable for committed
14 individuals to bring serial litigation advancing the time when public
15 accommodations will be compliant with the ADA.” Molski v. Evergreen
16 Dynasty Corp., 500 F.3d 1047, 1062 (9th Cir.2007). Nothing bars Plaintiff
17 from frequently invoking a federal forum to remedy ADA violations.

18 (Kohler, 794 F.Supp.2d at 1096; see also Schoors v. Seaport Village Operating Co., LLC,
19 2017 WL 1807954, *5 (S.D. Cal. May 5, 2017) (adopting the same rationale)).

20 **III. UNRUH CLAIM DOESN’T RAISE A NOVEL OR COMPLEX**
21 **ISSUE OF STATE LAW, DOESN’T PREDOMINATE OVER**
22 **THE ADA CLAIM, AND THERE ARE NO EXCEPTIONAL**
23 **CIRCUMSTANCES FOR DECLINING JURISDICTION.**

24 California’s “high-frequency litigant” statutes do not give reason under the §
25 1367(c) exceptions to decline supplemental jurisdiction. “High-frequency litigants” are
26 defined by section 425.55 of the California Code of Civil Procedure as “A plaintiff who
27 has filed 10 or more complaints alleging a construction-related accessibility violation
28 within the 12-month period immediately preceding the filing of the current complaint
alleging a construction-related accessibility violation” (Cal. Civ. Proc. Code §
425.55(b)(1)) or “An attorney who has represented... 10 or more high-frequency litigant
plaintiffs in actions that were resolved within the 12-month period immediately preceding

1 the filing of the current complaint...” (Cal. Civ. Proc. Code § 425.55(b)(2)).

2 Undoubtedly, many of plaintiff’s counsel’s clients fall within this definition.

3 However, this means little to the prosecution of a case. There are only three
4 consequences in state court litigation for a plaintiff being identified as a high-frequency
5 litigant. First, such plaintiffs must add some specific facts in their complaint and verify
6 the complaint certifying that it comports with... the exact language of Fed. R. Civ. Proc.
7 11. (Cal. Civ. Proc. Code § 425.50(a)(4)). But those “facts” are either required under
8 Federal Rule 26’s initial disclosure requirement or readily available in discovery.
9 Additionally, plaintiff’s counsel is already subject to Rule 11 in federal court. Second,
10 there is an additional \$1,000 filing fee (Cal. Gov. Code § 70616.5), which is divided into
11 the general fund and the trial court trust fund (Cal. Gov. Code § 68085.35). This fee
12 serves to relieve workload to the trial courts. (2015 CA A.B. 1521 (NS) (September 10,
13 2015). Ironically, though, the workload of the trial courts would be massively increased if
14 this Court were to decline supplemental jurisdiction. Finally, there are stay and early
15 evaluation procedures in state court for these cases. But those same procedures—almost
16 identical in nature—are available in the Central District with the ADA Disability Access
17 Litigation program and use of ADR Form 20. A defendant can request and a court can
18 sua sponte order the parties to participate in this process.
19

20 In any event, there is nothing unique in the state court procedures that are not
21 replicated in some fashion in the federal system. It is not the federal court’s task to decide
22 that it likes state court procedures better and to force a plaintiff to take plaintiff’s case to
23 state court because of that preference. That is not a compelling reason.

24 **IV. CONCLUSION**

25 Plaintiff respectfully requests this Court to continue to exercise supplemental
26 jurisdiction over the Unruh Civil Rights Act claim because all of the *Gibbs* value factors
27 weigh in favor of supplemental jurisdiction wherein dismissing the state claim would
28 result in a refiling of the state claim in state court. Dismissing the action would offend the

1 notions of fairness, judicial economy, and convenience that are the cornerstone of the
2 analysis about supplemental jurisdiction. Plaintiff's state law claim is premised on a
3 violation of the ADA and Plaintiff seeks minimal statutory damages, such that his Unruh
4 Act claim does not predominate over the ADA claim.

5
6 DATED: June 13, 2023

SO. CAL EQUAL ACCESS GROUP

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8 /s/ Jason J. Kim
9 JASON J. KIM
10 Attorney for Plaintiff
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